

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Kenneth Walker : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1972 & 1974. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of January, 1982, he served the within notice of Decision by certified mail upon Kenneth Walker, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kenneth Walker
115 E. 34th St.
New York, NY 10016

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
29th day of January, 1982.

Annice A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Kenneth Walker

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Unincorporated
Business Tax under Article 23 of the Tax Law for :
the Years 1972 & 1974.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of January, 1982, he served the within notice of Decision by certified mail upon Arnold Blech the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arnold Blech
1900 Hempstead Tpke.
E. Meadow, NY 11554

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
29th day of January, 1982.

Annice A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

January 29, 1982

Kenneth Walker
115 E. 34th St.
New York, NY 10016

Dear Mr. Walker:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Arnold Blech
1900 Hempstead Tpke.
E. Meadow, NY 11554
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
KENNETH WALKER
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1972
and 1974.

DECISION

Petitioner, Kenneth Walker, 115 East 34th Street, New York, New York 10016, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1972 and 1974 (File No. 22277).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 8, 1981 at 10:45 A.M. Petitioner appeared with Arnold Blech, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether petitioners sales activities constituted the carrying on of an unincorporated business, of which the income derived therefrom would be subject to the imposition of unincorporated business tax.

II. Whether penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law may properly be abated.

FINDINGS OF FACT

1. Petitioner, Kenneth Walker, timely filed a New York State Combined Income Tax Return with his wife for the year 1972 whereon he reported "business

income" of \$64,326.00, derived from his sales activities. For the year 1974, petitioner and his wife filed a joint New York State Income Tax Resident Return whereon he reported his sales income of \$20,880.00 as "other income, advance against commission". Petitioner did not file an unincorporated business tax return for either year at issue.

2. On December 9, 1977 the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that the aforestated income was subject to the imposition of unincorporated business tax "based on the decision of the New York State Tax Commission dated November 23, 1976.", which was issued with respect to taxable years 1969-1971 inclusive. Accordingly, a Notice of Deficiency was issued against petitioner on March 8, 1978 asserting unincorporated business tax of \$3,631.65, penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law of \$1,667.15, for failure to file unincorporated business tax returns and failure to pay the tax determined to be due, respectively, plus interest of \$1,254.80, for a total due of \$6,553.60.

3. During the years at issue petitioner was engaged in activities as a salesman of lighting fixtures and illuminating ceiling systems for Neo-Ray Products, Inc. and Neo-Ray Lighting Systems, Inc., respectively. Both companies were owned and controlled by the same individual, occupied the same premises, and shared the same employees.

4. During 1974 the Neo-Ray companies (Neo-Ray) formed a lighting agency, Lighting Unlimited Corp., to which all sales personnel, including the petitioner, were transferred.

5. Although petitioner's duties did not change as a result of his transfer to Lighting Unlimited Corp., income taxes were withheld from his compensation, whereas prior to such transfer, no such taxes were withheld by his principal.

Petitioner's income derived from Lighting Unlimited Corp. was not held to be subject to unincorporated business tax.

6. Petitioner was not assigned a specific territory, but rather was assigned specific accounts to call upon. Consent of his principal was required for him to call on new accounts.

7. Petitioner, who was compensated on a commission basis, was prohibited from representing any other company in the lighting fixture field.

8. Neo-Ray supplied petitioner with office and telephone facilities and engineering services. Furthermore, it supplied him with leads, catalogs and other promotional material.

9. Petitioner was required to report to Neo-Ray on a daily basis and attend weekly sales meetings.

10. Neo-Ray covered petitioner for Blue Cross, Blue Shield and Major Medical benefits.

11. Neo-Ray did not directly reimburse petitioner for his ordinary and necessary business expenses incurred, but rather it paid a commission rate which was sufficiently high for petitioner to incur such expenses personally.

CONCLUSIONS OF LAW

A. That the degree of direction and control exercised by Neo-Ray over the activities of petitioner, was sufficient for the existence of a bona fide employer-employee relationship. Accordingly, petitioner's income derived from Neo-Ray is exempt from the imposition of unincorporated business tax pursuant to section 703(b) of the Tax Law.

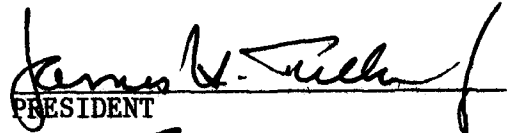
B. That the issue of penalties is moot by virtue of Conclusion of Law "A" supra.

C. That the petition of Kenneth Walker is granted and the Notice of Deficiency dated March 8, 1978 is hereby cancelled.

DATED: Albany, New York

JAN 29 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER